OH, THEVESA

v.

SIA HOK CHAI

HIGH COURT MALAYA, KUALA LUMPUR
LIM BENG CHOON J
[CIVIL SUIT NO. S7-23-73-90]
22 OCTOBER 1991

CIVIL PROCEDURE: *Application to strike out statement of claim - Damages for breach of promise to marry - One party already married - Whether existing cause of action - Whether contrary to public policy - Void promise - Chronology of events not certain as to when promise was made - Rules of the High Court 1980, O. 18 r. 19(1)(a), (b), O. 33 r. 2.*

The plaintiff commenced proceedings for damages for breach of promise to marry. At the time of the alleged promise, the defendant was already married. As a result of the promise the plaintiff gave up her job and allowed the defendant to have sex with her on various occasions, as a result of which a child was delivered by the plaintiff. The defendant contends that the promise to marry is contrary to public policy and void as the plaintiff knew that he was already married at the material time.

The Senior Assistant Registrar allowed the defendant's application to strike out the plaintiff's claim. The plaintiff appeals against that decision.

Held:

[1] The validity of a promise of marriage made by a defendant who was at the time of making the promise already married and the plaintiff to whom he made the promise was aware of his status, has not been fully settled in law. Nevertheless, the defendant cannot drive away the plaintiff by utilising the summary procedure in O. 18 r. 19. If there is a point of law which requires serious discussion an objection should be taken on the pleadings and the point set down for argument under O. 33 r. 2.

[2] Upon a careful scrutiny of the statement claim, it cannot be said with any degree of certainty whether the plaintiff was aware of the defendant's marital status when the defendant confessed his love and affection for the plaintiff and made a proposal to marry her.

[3] The plaintiff's knowledge of the defendant's marital status can be implied only if the paragraphing of the several averments in the statement of claim are indicative of the chronology of events that took place. It is however doubtful that in this case, the paragraphing must necessarily indicate the chronology. This view is supported by the fact that in the plaintiff's reply, she joined issue with the defendant regarding his averment that the plaintiff was at all material times fully aware of his marital status.

[Plaintiff's appeal allowed; defendant's application to strike out the statement of claim dismissed with costs.]

[Ed. note: The defendant has appealed to the Supreme Court.]

Cases referred to:
Arokiasamy v. Sundaram [1938] MLJ 4 ***(cit)***
Fender v. St. John Mildmay [1938] AC 1 ***(foll)***
Hubbock & Sons v. Wilkinson, Heywood & Clark [1989] 1 QB 86 ***(cons)***
Nafsiah v. Abdul Majid (No. 2) [1969] 2 MLJ 175 ***(cit)***

Nagle v. Feilden [1966] 2 QB 643 ***(cit)***
Millward v. Littlewood 155 ER 339 ***(cit)***
Skipp v. Kelly [1926] 42 Law TR 258 ***(foll)***
Spiers v. Hunt [1908] 1 KB 720 ***(not foll)***
Wild v. Harris [1843] All ER 413 ***(cit)***
Wilson v. Carnley [1908] 1 KB 729 ***(not foll)***

Legislation referred to:
Limitation Act 1953, s. 6
Rules of the High Court 1980, O. 18 r. 19(1)(a), (b), O. 33 r. 2
Law Reform (Miscellaneous Provisions) Act 1970 [UK], s. 1

For the plaintiff - Karpal Singh; M/s. Karpal Singh & Co.
For the defendant - Balwant Singh Sidhu; M/s. Balwant Singh Sidhu & Co.

JUDGMENT

Lim Beng Choon J:

On 21 May 1990 the plaintiff instituted this action against the defendant for damages for breach of promise to marry the plaintiff, interest and costs. For purpose of this judgment I need only to set out the following averments of the plaintiff as contained in the following paras. of her statement of claim endorsed in the writ:

> 3. The plaintiff first met the defendant sometime in the early part of 1982 through one Mr. Wong, their mutual friend. The plaintiff was at that time an insurance agent with AIA and the defendant had during the meeting expressed his desire of purchasing a life insurance policy from the plaintiff and invited the plaintiff to see him at his office to discuss the matter.
>
> 4. The plaintiff and the defendant became friends and it was only after a few meetings that the defendant confessed his love and affection for the plaintiff.
>
> 5. The defendant had on numerous occasions represented to the plaintiff the defendant's irreparable matrimonial problems and the defendant's seriousness in divorcing his wife and marrying the plaintiff.
>
> 6. Sometime around July/August 1982 the defendant requested the plaintiff to give up her job as an insurance agent and the plaintiff in pursuance of the defendant's request and in consideration of the defendant's promise to marry her gave up her said job.
>
> 7. In reliance upon the said promise the plaintiff sometime at the end of 1982 allowed the defendant to have sexual intercourse with her on various occasions in the car at Lake Garden Kuala Lumpur at No. 74A, Jalan Pahang, Kuala Lumpur and at No. 8, Jalan Pisang, Off Jalan Klang Lama, Kuala Lumpur and whereby as a result of the intimate relationship a child was delivered by the plaintiff on 20 July 1984.

The plaintiff then went on to aver that the defendant had since in breach of the promise refused to marry the plaintiff at all. In the premises the plaintiff has suffered humiliation and mental anguish and has suffered loss and damage.

In his statement of defence filed on 25 September 1990 the averments pertinent to this judgment are contained in the following para. of his statement of defence:

> 5. The defendant denies the allegation in para. 5 of the statement of claim and avers that the plaintiff knew that the defendant was at all material times a married man. At no time did the defendant ever state that he had matrimonial difficulties with his wife or that he ever intended to divorce her. The defendant denies ever having promised to marry the plaintiff.

6. The defendant denies requesting the plaintiff to give up her job as an insurance agent. The defendant reiterates that at no time did he ever promise to marry the defendant.

7. The defendant admits having sexual intercourse with the plaintiff on various occasions but avers that the plaintiff had invited the defendant to have sex with her in an attempt to induce him to buy an insurance policy from her. The plaintiff had even told the defendant that she separated from her husband and that she needed a man very badly.

8. The defendant denies ever having promised to marry the plaintiff. The defendant avers that at all material times the plaintiff herself was a married woman.

9. The defendant further avers that he was at all material times a married man and this fact was known to the plaintiff.

10. In any event the defendant avers that the plaintiff's claim is barred by limitation under s. 6 of the Limitation Act 1953.

The plaintiff thereafter filed in her reply on 5 October 1990 in which she said:

1. Save and insofar as the defence consists of admission and save as hereinafter appears the plaintiff joins issue with the defendant therein.

2. As to para. 10 of the defence the plaintiff says that her action is not statute barred under s. 6 of the Limitation Act. The plaintiff avers that although the defendant's initial promise to marry her was made sometime around July/August 1982, the defendant repeated and assured the plaintiff of the said promise right until the end of 1986. The plaintiff further avers that it was only sometime in 1987 that she came to realise that the defendant was not interested in pursuing with the marriage when the defendant's visits to her house became less frequent and his refusal to answer any of her telephone calls and alleging that he has nothing to do with her.

On 9 October 1990 the defendant thereupon made an application by way of summons-in-chambers for an order that:

(a) The plaintiff 's claim be struck out under O. 18 r. 19(1) (a) & (b) of the Rules of the High Court 1980;

(b) The costs of and incidental to this application be costs in the cause.

In support of his application the defendant affirmed an affidavit on 8 October 1990 in which he reiterated that he had never promised to marry the plaintiff and that in any event the plaintiff knew at all material times that he was a married man. This was apparent from the statement of claim itself. He was therefore informed presumably by his legal adviser and he verily believed that the plaintiff's claim was bad in law as she could not maintain a suit for breach of promise to marry in the circumstances as she had no cause of action. The defendant went on to assert that it was apparent from the statement of claim itself that the defendant's claim was time-barred.

The matter came before the Senior Assistant Registrar (SAR) on 2 May 1991 who after hearing the submissions of the Counsel acting for the respective parties allowed the application of the defendant with costs. Being dissatisfied with the decisions of the SAR the plaintiff appealed to me on 3 May 1991 against the decision of the SAR.

The appeal of the plaintiff was heard by me on 14 August 1991 and after a careful scrutiny of the pleadings and the affidavit of the defendant and after hearing the submissions of the Counsel acting for the respective parties I allowed the appeal of the plaintiff and set aside the order of the SAR. The defendant now appeals to the Supreme Court against my decision and I shall now give my grounds for allowing the appeal of the plaintiff.

Now it is a well-settled rule that it is only in plain and obvious cases that recourse should be had to the summary process under O. 18 r. 19(1)(a) and (b) [See *Nagle v. Feilden* [1966] 2 QB 643 @ 648 & 651]. The summary procedure under this rule can only be adopted when it can be clearly seen that a claim or an answer is on the face of it "obviously unsustainable". If there is a point of law which requires serious discussion an objection should be taken on the pleadings and the point set down for argument under O. 33 r. 2. Thus in *Hubbock & Sons v. Wilkinson, Heywood & Clark* [1899] 1 QB 86 @ 91 it was said:

> Two courses are open to a defendant who wishes to raise the question whether, assuming a statement of claim to be proved, it entitles the plaintiff to relief. One method is to raise the question of law as directed by O. xxv r. 2; the other is to apply to strike out the statement of claim under O. xxv r. 4. The first method is appropriate to cases requiring argument and careful consideration. The second and more summary procedure is only appropriate to cases which are plain and obvious, so that any master or Judge can say at once that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to what he asks. The use of the expression "reasonable cause of action" in r. 4 shows that the summary procedure there introduced is only intended to be had recourse to in plain and obvious cases. Courts have always so construed r. 4, although sometimes, no doubt, a statement of claim may be so long and the facts so complicated that considerable time and attention are required to ascertain their true result, as in *Republic of Pereu v. Peruvian Guano Co.* [1887] 36 Ch. D. 489. If in this case it were necessary, in order to justify us in striking out the statement of claim, to come to the conclusion that *Western Counties Manure Co. v. Lawes Chemical Manure Co.* LR 9 Ex. 218 was not law, and was in effect overruled by *White Mellin* [1895] AC 154, we should be of opinion that the question raised was too difficult and important to justify the Court in summarily striking out the claim.

In the present case Counsel for the defendant in his submission indicated that the fact that the plaintiff was fully aware that the defendant was a married man at the time when he made the promise to marry her precluded the plaintiff from pursuing her action for in allowing her to do so would be immoral and against public policy and he relied on two old English cases to support his argument namely the case of *Spiers v. Hunt* [1908] 1 KB 720 and *Wilson v. Carnley* [1908] 1 KB 729. Let us therefore examine the facts and principles of law laid down in the two cases. They were both cases in which a husband during the lifetime of his life had promised to marry another woman on the death of his wife. In the first case the promise to marry after the death was express: in the second it was implied from the fact that both parties knew the wife to be alive. In the first case immoral relations followed the promise and Phillimore J. drew an inference of fact from the evidence to formulate a finding of fact that "the man only promised to marry the woman in order to gain immediate possession of her person and that the woman knew that was his object" (see p. 728 of the reported case). I have no doubt that this finding greatly influenced the learned Judge to arrive at his conclusion that:

> The tendency of such a contract is to make the husband in thought if not in deed, unfaithful to his wife. In certain cases it might even lead to crime. Its very probable result is sexual immorality. (See p. 724 of the reported case)

In both cases the husband and wife were living together in normal conditions though in the first case the wife was already an invalid but she survived seven or eight years after the promise was made. It is to be noted that in the second case there was no statement that the woman knew that the husband made the promise with the object of seducing her. Nonetheless the Judges in the second case followed with approval the principle laid down by Phillimore J. in the first case and held that a promise made in such circumstances tended to cause immoral relations and hence the promise infringed public policy.

In a later case of *Fender v. St. John Mildmay* [1938] AC 1 HL the Law Lords of the House of Lords did not specifically say that the decisions made by the Judges in the two cases mentioned above were wrongly decided but they strongly criticized the principle enunciated by Phillimore J. in *Spiers* case. Thus Lord Atkin said at pp. 15-16:

> Here the Judges appear to have thought that a promise made in such circumstances tended to cause immoral relations. They may be right; speaking for myself I really do not know whether that result would follow as a rule. I can only say that if the lady yields to a promise with such an indefinite date she is probably of a yielding disposition, and it would appear difficult to predicate that immorality is either facilitated or accelerated by the promise. As to the suggestion that such a promise is bad because it tends to induce the husband to murder his wife, I reject this ground altogether.

Lord Thankerton likewise indicated his doubt about the correctness of the decisions made in the *Spier* case and the *Carnley* case when he said at pp. 24-25:

> This consideration makes it clear to my mind, with all respect to my noble and learned friends who hold a contrary view, that there is **no general principle of public policy** that no contract is enforceable, which is inconsistent with maintenance of the obligations of the marriage tie or, to phrase it otherwise, with loyalty to the other spouse. I am therefore not surprised on consideration of the cases of *Spiers v. Hunt* and *Wilson v. Carnley* to find that these decisions are mainly based on the general tendency of the contracts under consideration to immorality or crime. In both these cases a spouse promised to marry a third party after the death of his wife, a future and uncertain point of time. The only other of these decisions rests upon the reference to the opinion of the Chief Justice in the American case of *Noice v. Brown* which is based on protection of married state. But, in my opinion, the law in this country as to separation agreements is inconsistent with the American law, as stated by the Chief Justice. There can be no justification for expanding the principles of public policy in this country by reference to the public policy of another country. (Emphasis supplied)

and lower down p. 25. His Lordship went on to say:

> Public policy is not concerned with tendencies that may exist in a **very limited** number of cases; and I am satisfied that the tendency to prejudice the probability of a reconciliation is of such rare occurrence that the Courts would not be justified in relying on the ground as a basis of their refusal to enforce a contract.

(Emphasis supplied)

Lord Wright likewise threw doubt in the correctness of the decisions in the two cases in question when he said at p. 48:

> Again in *Wild v. Harris* and in *Millward v. Littlewood* the Court of Common Pleas and the Court of Exchequer respectively did not hold a promise to marry only a person already married as bad in law. It is curious that Pollock C.B. and Park B. appear to have taken different views on this question of public policy. Both these cases presented complications and might, it seems, have decided on other grounds than the mere promise in favour of the plaintiffs. The Court of Appeal in *Wilson v. Carnley* were prepared if necessary to overrule these authorities. In that case the plaintiff and the defendant both thought the wife was likely to die soon. So far as I can follow the precise reasons given why the contract was *void ab initio* as being against public policy, they were primarily that the contract was likely to induce a breach of morality and likely to conduce either the crime of murdering the spouse or perhaps the attempt to procure dissolution of the marriage by conduct on the part of the husband which would compel the wife to seek divorce. It was also said that such a promise was inconsistent with that affection which should subsist between married persons. I agree that it is difficult to imagine from the standpoint of an affectionate and happy marriage or indeed any marriage where the parties were living together how a man or a woman could in the consort's lifetime enter into an engagement to marry another. As I have said I am prepared to

> assume without finally deciding whether *Wilson v. Carnley* is rightly decided. But I do not see why it should be said that such a promise as that in question would conduce to immorality that the Court would hold it void on the ground. On a matter of this nature, there neither is nor can be evidence on which the Judge can act. The question is a question of law, and the Judge must, if necessary, act upon general consideration of human nature. Some Judges may feel under suspicions or pruriency are to be avoided. I am not sure how considerations of that sort apply in such a case unless it is conceived that an act of such disloyalty shows such that anything may be expected.

Quite apart from the aforesaid effusive criticisms afforded by the Law Lords in their judgments in the *Fender* case against the principle laid down by Phillimore J. in the *Spier v. Hunt* case, I would also like to point out certain features in the *Fender* case which equally show that the Law Lords are not convinced of the correctness of the judgments given in *Spier v. Hunt* and *Wilson v. Carnley*. It is significant to note that in the *Fender* case, the defendant was already married when he first met the plaintiff at a nursing home where she was a nurse. He told her that he was unhappy with his wife and later asked her whether, if his wife divorced him, she would marry him after the divorce. She consented thereupon sexual relations took place between them. Thereafter the wife petitioned for divorce on the ground of his adultery with the plaintiff and a *decree nisi* was pronounced on 16 January 1933. The *decree nisi* could only be made absolute after a lapse of 6 months. In February and April 1933 the defendant promised to marry the plaintiff immediately after the decree had been made absolute. In such state of affairs and had the Law Lords been convinced of the correctness of the judgments given in *Spier v. Hunt* and *Wilson v. Carnley* one would expect the Law Lords to give at least some indication as to whether the promise made by the defendant to the plaintiff prior to his wife's petition for divorce was valid or not pursuant to the principle laid down by Phillimore J. in *Spier v. Hunt.* It might well be true that the promise relied by the plaintiff to institute her actions for breach of contract and damage was based on the two promises made after the *decree nisi* was granted to the wife but nonetheless if the Law Lords support the judgments of the two cases mentioned above they would have given some indication that Phillimore J. s principle could only apply to the earlier promise and not to the two later promises.

Another feature of the *Fender* case emanates from the following observations of Lord Atkin which appear at p. 17 of the decided case:

> If a respectable man whose wife has fled with the lodger leaving the children in his charge engages himself to another respectable person to marry her as soon as he is free no public interests suffer. In my opinion they benefit. Similarly, in the converse case of a wife whose husband is living with another woman of whose child he is the father. Do either of these persons still owe any kind of duty to love or cherish the other spouse, to whom no doubt they are still married or owe them any doubt which in the interest of themselves or of the public will be impaired by a promise to marry a third person when free? From the point of view of law it ought to be remembered as an essential factor in this discussion that by legislation it has been established that it was not contrary to public policy that immediately after final divorce either of them should marry.

These observations of Lord Atkin show clearly that he is not convinced that the principle laid down by Phillimore J. mentioned above must without any reservation apply to **all** cases of similar nature.

I would like to refer to the Privy Council case of *Skipp v. Kelly* [1926]42 Law TR 258. In that case Mrs. Kelly was first married in 1905 but lived apart from her husband after two years of married life. She became acquainted with Mr. Skipp then a widower, and he proposed marriage to her and offered to help her in procuring a divorce. She accepted his proposal of marriage

provided that she obtained a divorce and he supplied her with funds for that purpose. She obtained a decree in 1913 and a decree absolute in 1914. Mr. Skipp then gave her an engagement ring. It was eventually arranged that the marriage should take place in December 1919 but he made various excuses and ultimately married another lady in 1920. Mrs. Kelly then brought the action claiming damages. Mr. Skipp, in answer to her claim, denied that he renewed his offer after her divorce in 1914 and asserted that Mrs. Kelly, who was a Roman Catholic and whose divorced husband was alive until 1920, was never in a position to marry. The District Judge decided that the original promise before the woman had been divorced was void and contrary to the policy of the law but that afterwards a valid contract existed and was renewed when the date of the wedding was arranged. He gave judgment for Mrs. Kelly and awarded her Rs. 50,000 as damages which was subsequently reduced by the Court of Resident to Rs. 15,000. The defendant then appealed to the Privy Council. The main legal point posed to the Privy Council was whether it was possible to infer that really was in law a new promise to marry. The Privy Council agreed with the Judges in the Court below that there was a new contract when the appellant gave the respondent an engagement ring after the latter had obtained a degree absolute and went on to make arrangement for the wedding to take place in December 1919. In arriving at the conclusion the Privy Council also made the following observation (p. 259):

> It was understood between them that a divorce was pending and a divorce afterwards took place but it had been quite settled in law that a promise made in these circumstances was a void promise.

That observation to my mind is mere *obiter*-the *ratio decidendi* of the Privy Council's decision was that there was a valid contract made **after** Mrs. Kelly had procured a degree absolute and thereupon Mr. Skipp gave her an engagement ring pronouncing the couple's betrothal. In any event as the two cases of *Spiers v. Hunt* and *Wilson v. Carnely* were never cited in the *Skipp* case it cannot be said that the judgments in the two cases were approved by the Privy Council.

From the above discussions I am of the view that the validity of a promise of marriage, made by a defendant who was at the time of making the promise already married and the plaintiff to whom he made the promise was aware of his status, has not been fully settled in law. It is for this reason that the English Parliament thought it fit to enact the Law Reform (Miscellaneous Provisions) Act 1970 s. I abolishing all actions for breach of promise of marriages so that the cases just discussed are, strictly speaking obsolete.

There is no decided case in this country on point. Indeed it appears to me that in one case at least it was held that the English common law as expounded in *Spiers v. Hunt* and *Wilson v. Carnely* could not apply to the conditions prevailing in this country and more particularly to males professing the Muslim faith - see per Sharma J. in *Nafsiah v. Abdul Majid* (No. 2) [1969] 2 MLJ 175.

Reverting to the present case, notwithstanding the uncertainty of the law as discussed above yet, the defendant here tries to drive away the plaintiff from the judgment seat by utilising the summary procedure sets out in O. 18 r. 19 of the Rules of the High Court 1980. This he cannot do for to my mind the issue raised in his application for summary judgment warrants a mature and careful consideration on a serious point of law. He should have adopted the procedure set out in O. 33 r. 2 of the Rules of the High Court 1980 after both parties have agreed to indisputable facts involved in the case. The summary procedure is as stated earlier only appropriate to cases which are plain and obvious so that any Judge can say at once that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to what he asks - See: *Hubbock & Sons v. Wilkinson Heywood & Clark (supra).*

Furthermore in the present case no one can say with any degree of certainly, upon a careful scrutiny of the statement of claim of the plaintiff as to whether when the defendant confessed his love and affection for the plaintiff and made a proposal to marry her resulting in her giving up her job as an insurance agent and allowing the defendant to have sexual intercourse with her, the plaintiff was aware of the marital status of the defendant. It is true that the plaintiff averred in para. 4 of the statement of claim that the defendant confessed his love and affection for the plaintiff and at para. 5 she averred that the defendant had on numerous occasions represented to the plaintiff his marital problems and his intention to divorce his wife. Following these averments the plaintiff went on further to aver in paras. 6 and 7 that in consideration of and reliance upon the promise of the defendant to marry her, the plaintiff gave up her job as an insurance agent and also allowed the defendant to have sexual intercourse with her. One can imply that the plaintiff was aware of the defendant's marital status at the time when the defendant confessed his love for her and offered to marry her if and only if the paragraphing of the several averment are indicative of the chronology of the events that took place. I am, however, doubtful that the paragraphing of the averments must necessarily indicate the chronology of events that took place particularly when no date was given as to when the events as stated in paras. 4 and 5 of the statement of claim took place and in the plaintiff's averment in her statement of claim that " It was only after a few meetings that the defendant confessed his love and affection for the plaintiff". It might well subsequently turn up that the defendant admitted he was a married man having irreparable matrimonial problems which caused him to want to divorce his wife **after** having confessed his love for the plaintiff and after proposing to marry her resulting in the plaintiff agreeing to abide by the defendant's wishes and to allow herself to be seduced. I find support for this proposition in the reply of the plaintiff in which she joined issue with the defendant regarding his averment that the plaintiff was at all material times fully aware of his marital status. Needless to state that should it be later shown that the plaintiff was only aware of the marital status of the defendant and his marital problems **after** the events stated in paras. 4, 6 and 7 of the statement of claim had taken place then of course the defendant's contention that the action of the plaintiff could not be sustained on ground of immorality and public policy would be worthy of consideration - See: *Arokiasamy v. Sundram* [1938] MLJ Rep. 4, *ild v. Harris* [1843] All ER 413 and *Millward v. Littlewood* 155 ER 339. I also took note of the averments of the defendant where he denied ever having promised to marry the plaintiff or ever having told her of his marital problems. These denials go only to throw doubt as to when exactly the plaintiff came to know of the defendant's marital status.

In the ultimate analysis I am satisfied that the defendant is not entitled to summary judgment and have the statement of claim struck out. I therefore dismissed his application made under O. 18 r. 19 of the Rules of the High Court 1980 with costs.

Also found at [1992] 1 CLJ 170